As for the alleged plaintiff's failure in their fiduciary duty to the first defendant, I was again referred to the memorandum of deposit at cl 10 which reads:

> And we hereby undertake to ratify all acts and deeds carried out by the finance company in furtherance of this power of attorney and we hereby declare that the attorney(s) shall not be held responsible or liable to us for any loss or damage howsoever and whatsoever arising as a result of any act neglect or omission of the attorney in the execution of the power under this instrument and any matter or thing in relation thereto and we shall keep the attorney(s) indemnified against all costs expenses and charges which the attorney(s) may incur in the exercise of the powers aforesaid.

In *Warner* v *Jacob*[14] it was held that:

> If a mortgagee exercises his power of sale bona fide for the purpose of realizing his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud.

In *Cuckmere Brick Co Ltd & Anor* v *Mutual Finance Ltd*[15] the court's view was:

> There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it.

Again, in *Colson* v *Williams*,[16] the court found that:

> A power of sale in a mortgage deed is to be regarded as limiting the exercise of the rights of legal ownership of the mortgaged property, and at the same time as enabling the mortgagee to realize his security; and as the mortgagee is the sole judge of what is necessary to enable him to realize, his motives in exercising the power will not be regarded by the court, and so long as he does all that he fairly can do to obtain a fair price, as a prudent owner including to sell for his own advantage and to the best of his judgment, he will come under no liability to the mortgagor or puisne incumbrancer.

These authorities, in fact, also shatter the points raised by the defendants in their amended defence and counterclaim. Also, in *In re McMurdo; Penfield* v *McMurdo*[17] it was decided that:

> A mortgagee holding shares is not bound, as mortgagee, to be looking about for every turn of the market to see whether he can sell, nor is he bound to sell at the highest price the market can give.

There is only probably one other point that merits mention and that is the second, third and fourth defendants contend that they are only liable up to the amount of $1,000,000 and not $5,000,000. Since the loan agreements and guarantee state otherwise, and as there is no evidence to support this contention, I found no favour in this argument. The fact that the second, third and fourth defendants had initialled each page of the guarantee agreement, and that in their affidavits had not given details of any variation to that agreement or of any misrepresentation by any officer of the plaintiff, only strengthens my view that this is just a bare assertion in the circumstances.

Having reviewed the arguments advanced, I was of the view that the appeal by the defendants ought to be dismissed with costs except for the appeal by the second defendant which I had to allow purely on my finding that there was no concrete proof that the letter of demand had actually reached him.

Appeal of second defendant allowed.

Solicitors: *Cheang & Ariff; Henry Lim & Co.*

Reported by *Michele Rasanayagam*

Government of Malaysia v Teoh Chai Siok

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 21-01-88
KC VOHRAH J
4 OCTOBER 1989

Revenue Law — Recovery of additional tax and late payment increases — Nature of additional tax and late payment increases — Whether they amount to a debt and penalty — Whether limitation period applies for recovery of tax and penalty — Income Tax Act 1967, ss 103(4), (5A), 106(1) & 142(1) — Limitation Act 1953, s 6(1)(d) & (4)

Limitation — Nature of additional tax and late payment increases — Whether they amount to a debt and penalty — Whether limitation period applies for recovery of tax and penalty — Income Tax Act 1967, ss 103(4), (5A), 106(1) & 142(1) — Limitation Act 1953, s 6(1)(d) & (4)

The plaintiff claimed a sum of $333,400.33 being additional tax and late payment increases under the Income Tax Act 1967. The additional tax was assessed in 1975 and was disputed by the defendant. The defendant appealed unsuccessfully right up to the Judicial Committee of the Privy Council. The additional tax remained unpaid by the defendant even after the disposal of the appeal and on 20 May 1987, the defendant was sent a notification that late payment increases had been imposed and he was required to settle the additional tax and late payment increases. Summary judgment was obtained and the defendant appealed against the decision. The defendant alleged that: (1) the additional tax component had become a debt and was therefore barred from recovery under s 6(1)(d) of the Limitation Act 1953; and (2) the late payment increases were penalties and were barred from recovery under s 6(4) of the Limitation Act 1953.

Held, dismissing the appeal:

(1) The additional tax of $288,658.70 was clearly tax due and payable and may be recoverable by civil proceedings as a debt due under s 106 of the Income Tax Act 1967. Similarly, late payment increases are imposed under ss 103(4) and 103(5A) which state that the increased sum shall be recoverable as if it was a tax due and payable which would also fall under s 106 and may be recoverable as a debt.

(2) The word 'debt' in s 106(1) of the Income Tax Act 1967 does not change the complexion of the amount claimed; it is still

a tax which is due and payable and recoverable by civil proceedings. The late payment increases, whatever their nature and whether they amount to penalties, are deemed by statute to be taxes for purposes of recovery.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 01-40-89.]

Cases referred to

1 *Arumugam Pillai* v *Government of Malaysia* [1976] 2 MLJ 72 (folld)
2 *Chong Woo Yit* v *Government of Malaysia* [1989] 1 MLJ 473 (folld)

Legislation referred to

Income Tax Act 1967 ss 103(4), (5A), 106(1), 142(1)
Limitation Act 1953 s 6(1)(d), (4)

Balia Yusof for the plaintiff.
Yeap Chye Choon for the defendant.

Cur Adv Vult

KC Vohrah J: On an O 14 application, the senior assistant registrar gave leave to the plaintiff, the Government of Malaysia, to enter final judgment against the defendant. The plaintiff had claimed against the defendant for the recovery of $333,400.33 being additional tax and late payment increases under the Income Tax Act 1967 ('the Act') assessed against him in respect of the year of assessment 1974. Interest at the rate of 8% pa from the date of judgment to date of realization was also claimed.

In support of the O 14 application for leave to enter final judgment against the tax payer, the plaintiff filed a certificate under s 142(1) of the Act. It is signed by assistant director Puan Norlia bte Zainol for and on behalf of the Director-General of Inland Revenue and certifies that the amount due from the defendant (whose name and address were supplied) is $333,400.33. Under the said provision, the production of such a certificate giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount.

The defendant has appealed against the decision of the senior assistant registrar.

The sum of $333,400.33 claimed comprises three components:

(i) the sum of $288,658.30 being additional tax for the year of assessment 1974, notice of assessment of which, dated 18 January 1975, was served on the defendant;
(ii) the late payment increase of $28,865.83 being the increased sum calculated under s 103(4) of the Act at a 10% increase on the additional tax in item (i) on the failure of the defendant to pay the tax within thirty days of service of notice of assessment;
(iii) the late payment increase of $15,876.20 being the increased sum calculated under s 103(5A) of the Act at a 5% increase on the amounts in item (i) and (ii) on the failure of the defendant to pay both amounts.

The defence counsel says the additional tax component is not recoverable as, if I understand him correctly, it has become a 'debt' and is therefore barred from recovery under s 6(1)(d) of the Limitation Act 1953. It is further argued that the late payment increases, ie the sums in items (ii) and (iii), being penalties, are barred from recovery under s 6(4) of the Limitation Act 1953 since the provision bars recovery of penalties one year from the date on which the cause of action in regard to the penalties accrued. It is argued that the plaintiff was not entitled to summary judgment in this case and the senior assistant registrar was wrong to give leave to the plaintiff to enter summary judgment against the defendant.

Before I proceed further, although it would appear from the affidavits filed by the defendant himself that many other issues were raised before the senior assistant registrar, these other issues were, however, not pursued before me. I believe they were abandoned because the law on these other issues has been settled.

I now touch on the salient facts of the case. The additional tax was assessed in 1975 and it was disputed by the defendant.

The defendant appealed to the special commissioners against the assessment of the additional tax and the appeal was dismissed. The defendant then unsuccessfully appealed to the High Court by way of case stated. He appealed right up to the Judicial Committee of the Privy Council which in 1981 (see [1981] 1 MLJ 269) affirmed the decision of the Federal Court dismissing the appeal from the High Court.

This additional tax remained unpaid by the defendant even after disposal of the appeal and on 20 May 1987 the defendant was sent a notification notifying him of the late payment increases under s 103(4) and (5A) of the Act (which I had set out earlier) and requiring him to settle the additional tax and late payment increases which altogether amount to $333,400.33.

Clearly in regard to the 'additional tax' of $288,658.70 assessed for the 1974 year of assessment, the tax is 'due and payable' and 'may be recovered by civil proceedings as a debt to the government' under s 106(1) of the Act.

As regards each of the late payment increases imposed under s 103(4) and 103(5A), each of these provisions state that the increased sum 'shall be recoverable as if it were tax due and payable under this Act'. Thus the late payment increases too fall under s 106 of Act in that they amount to 'tax due and payable' and 'may be recovered by civil proceedings as a debt due to the Government'.

In the Federal Court case of *Arumugam Pillai* v *Government of Malaysia*[1] Gill CJ (Malaya) said at p 73:

> In our judgment limitation as such does not apply to any proceedings by the government for the recovery of any tax. This would seem clear from the proviso to s 33(1) of the Limitation Ordinance 1953.

This principle has been reiterated in the Supreme Court case of *Chong Woo Yit* v *Government of Malaysia*[2] where Gunn Chit Tuan SCJ cited at p 474 the above passage (and one other sentence following it) and said:

> We would agree that by virtue of the proviso to s 33(1) of the Limitation Act 1953, limitation does not apply to the commencement of any proceedings by the government for the recovery of any tax or interest thereon, ...

The Supreme Court agreed with the rider in *Arumugam*'s case[1] (I have not reproduced either passage) relating to the defence of limitation when it is raised in regard to an assessment under s 91 of the Income Tax Act 1967 but that rider does not concern us in this case.

With respect to counsel for the defendant, I cannot see how he can argue that because the additional tax assessed has become a 'debt', it therefore is barred from recovery under s 6(1)(d) of the Limitation Act 1953. The word 'debt' in s 106(1) does not change the complexion of the amount that is claimed; it still is a tax which in the words of the provision is 'due and payable' and may be recovered by civil proceedings. So far as the late payment increases are concerned, whatever their nature and whether they amount to 'penalties' or not, they are by statute deemed to be taxes for the purposes of their recovery; they 'shall be recoverable as if (they) were tax due and payable under this Act'. And in the same way they too, by virtue of s 106(1), may be recovered by way of civil proceedings. I cannot see how the Limitation Act 1953 bars the recovery of these amounts, ie the additional tax or the late payment increases bearing in mind the principle enunciated in *Arumugam Pillai*[1] and *Chong Woo Yit*.[2]

As previously stated, the certificate under s 142(i) of the Act was filed with the O 14 application. The senior assistant registrar acted on this certificate and was therefore right in giving leave to the plaintiff to sign final judgment against the defendant.

In the circumstances, I dismissed the appeal of the defendant.

Appeal dismissed.

Solicitors: *Yeap Chye Choon & Co.*

Reported by *Yap Shao Sin*

Bank Bumiputra Malaysia Bhd v Galian Saham Sdn Bhd & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 23-351-87
PEH SWEE CHIN J
10 MAY 1989

Banking — Claim under charge executed — Whether guarantee having limit executed by same party limits liability of chargor — Duty of care of chargee to chargor — Whether duty discharged

Civil Procedure — Statement of claim based on charge — Separate cause of action arising from each transaction — Cause of action on guarantee intentionally left out — Rules of the High Court 1980, O 14

The first defendant was a customer of the plaintiff bank. Overdraft facility was given on the security of a charge executed by the second defendant over a piece of mining land of the second defendant. Further security was provided by two letters of guarantee signed by the second and third defendants respectively subject to certain expressed limits. The plaintiff's claim against the second defendant was only in its capacity as chargor and not as guarantor. Summary judgment was obtained by the plaintiff and the second defendant appealed.

The second defendant (chargor) alleged that (a) the liability was limited to 60% of the overdraft facility granted which the chargor had agreed to pay on demand by virtue of the letter of guarantee; (b) the plaintiff owed a duty of care to the chargor as the mining lease was allowed to expire in June 1985, and this action was only filed in 1987.

Held, dismissing the second defendant's appeal:

(1) The plaintiff's claim, as can be read from the statement of claim against the second defendant, was on the charge and not on the guarantee. Each will give rise to separate and distinct causes of action. There was nothing in the charge documents which set any limit of repayment. No reference to the charge was made in the letter of guarantee to the effect that whatever sum which the chargor agreed to repay in any subsequent charge to be signed would be void unless that such sum was limited.

(2) The duty of care of a chargee towards a chargor would be to make it, as far as possible, for the chargor to repay as little as possible, or to have as much surplus as possible after sale of the charged land. Judicial notice was taken of the fact that the chargor was a financially powerful company created and owned by the state government who had been the issuing or renewing authority of any mining lease in the state. These factors could have played a crucial role in the plaintiff granting the overdraft facility. To renew a mining lease which was to expire soon would obviously be much more for the benefit of the chargor than the chargee in view of the personal covenant to pay and the fact judicially noticed by the court. To sell the mining lease not at the request of the chargor would amount to the withdrawal of the overdraft facility of which the first defendant was in dire need. As such the plaintiff had not been in breach of the duty of care.

[*Editorial Note*: The second defendant appealed to the Supreme Court vide Civil Appeal No 03-43-89. The appeal was heard and dismissed by the Supreme Court on 13 December 1989.]

Cases referred to

1 *Standard Chartered Bank* v *Johnny Walker* [1982] 1 WLR 1410 (refd)
2 *Donoghue* v *Stevenson* [1932] AC 562 (refd)